than show why the instruction given was wrong and indicate what instructions should be given upon a new trial? And, if the case must be noticed, why set it out in terms which suggest entire approval of the instruction therein involved? If it was the purpose of the court to unsettle the rule established by the other cases above cited, we were certainly entitled to a fuller statement of the position of the court. If such was not the purpose, the reference to this case is misleading. E. N. D.

THE POWER TO REGULATE MOVING PICTURES.—The right of the state legislature, in the exercise of its police power, to provide for a board of censorship of motion picture films has again been affirmed in the case of *Buffalo Branch, Mutual Film Corporation, et al* v. *Breitinger, et al,* decided in the supreme court of Pennsylvania and reported in 95 Atl. 433. The case reaches the same conclusion as was reached in the cases of *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 35 Sup. Ct. 387, and *Mutual Film Corporation of Missouri* v. *Hodges, et al,* 35 Sup. Ct. 393, commented on in 13 MICHIGAN LAW REVIEW, 515. It is in some respects, however, a more significant case.

In the two cases decided by the United States supreme court the decision was made to turn very largely upon a definition of the term "freedom of speech," which was held not to include motion picture exhibitions. It could perhaps reasonably be asked whether the exhibition of a motion picture film is not such a publication of the sentiments of the author, actors and producer that it could be regarded as a communication and as within the protection of the clause guaranteeing the freedom of speech. In that view, the opinion of Mr. Justice MCKENNA in the federal cases leaves something to be desired. In the Pennsylvania case, however, where the facts are substantially the same, the court has squarely faced the seeming conflict between the police power of the state and the guarantees of the Fourteenth Amendment. The statute in question is justified solely as an exercise of that power, even though it be in derogation of some guaranteed right of the individual. The court, quoting, says, "in the exercise of the police power the Legislature may enact laws in the interest of public morals, and to protect the lives, health, and safety of persons following specific callings, and thus indirectly interfere with freedom of contract, *i. e.,* with individual liberty and the right to acquire and use property."

While the question of the censorship of motion picture films has thus far given no embarrassment to the courts, there is no doubt that in this so-called "social legislation," of which the amount has been great in recent years, and which can be justified, if at all, only on the grounds of the police power, the courts have experienced no little difficulty in establishing an equilibrium between the exercise of the police power and the individual rights given by the constitution. The determination of questions of this type presents a peculiarity of jurisprudence that is worthy of notice.

Before condemning a statute as unconstitutional the court should be convinced that the violation is "plain and clear," so "manifest as to leave no

room for reasonable doubt." Whether the courts in passing upon this sort of legislation have always adhered to this administrative rule may well be doubted; see Professor THAYER'S comment on *Commonwealth* v. *Perry*, 155 Mass. 117, and *State* v. *Loomis*, 115 Mo. 307, in 26 GREEN BAG, 514; also a comment in 13 MICHIGAN LAW REVIEW 497 on the case of *Coppage* v. *Kansas*, 35 Sup. Ct. 240. But laying aside the question whether the courts have or have not transcended their power in this respect, and assuming that they have not held a law unconstitutional unless they were convinced that, in the words of Mr. Justice HOLMES, "an honest difference of opinion was impossible," we turn to inquire into the nature of their task in deciding whether or not an honest difference of opinion is possible.

Let us suppose a case like that in *Re Opinion of the Justices*, 220 Mass. 627, 108 N. E. 807, commented on in 14 MICHIGAN LAW REVIEW, where the legislature attempted to pass an act requiring the employer to give his employee a right to be heard and faced by the informant before being discharged. Such a law is no doubt an abridgment of the employers' liberty and property. On the other hand, it may be necessary protection to a large element of the population of the commonwealth. The two considerations must be balanced against each other: the rights of the individual on the one side and the interests of society on the other. If the law is necessary to promote the welfare, "health, good order, morals, peace or safety of society," it is a constitutional exercise of the police power and any individual interests that come in conflict with the act must be sacrificed. But how is the court to be certain beyond all doubt that the law is not necessary to the general welfare of society, or that it is?

What the welfare, health, morals and safety of society demand are clearly not to be deduced from anything that can be found in the realm of the purely legal or judicial. Whether the general welfare demands that employees be protected from unfair and arbitrary expulsion from employment, that employers be required at all events to pay wages in legal tender (*State* v. *Loomis*, supra), that the sale of milk without license be prohibited (*Liebermann* v. *VanDeCarr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305), these are matters that can be decided by no reference to the rules of common law. That great body of jurisprudence contains no principles that tell us whether the general weal may require that babies be protected from bad milk or employees from bad employers. Indeed, those are not questions of principle, but go rather to the nature and needs of an existing, developing and dynamic society. The question which the courts must decide is this: Is there a possibility that society, as at present constituted, has need, to attain its general good, for a law of the sort in question. The inquiry goes to society, its mechanism, its constitution, its complex inter-relations, its needs. In a sense these are matters of fact, of socioligical and economic fact. Strictly speaking, the court has laid aside its role of jurist and taken on that of the economist. The court's own power of judicial review has driven it from its home and haunts.

How far the courts have been driven into the fields of sociological inquiry is best seen from the arguments of the cases themselves. In the principal

case of *Film Corporation* v. *Breitinger,* the court, in considering the bearing of censorship on the general moral welfare, refers to "THE SURVEY," a publication admittedly devoted to matters purely sociological. The court has taken cognizance of the social good to be derived from the action of the board in adopting standards "curtailing prolonged love scenes which are ardent beyond the strict requirements of the dramatic situation" and notes that "It has discountenanced the portrayal of crime where it degenerates into pandering to a morbid appetite." Or consider the case of *Coppage* v. *Kansas,* supra, where the court argues the statute in question out of the realm of the police power on the ground that it is not the business of the legislature to cure "inequalities of fortune," an argument going purely on economic considerations. Again, see the case of *Block* v. *City of Chicago,* 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219, where the court took into consideration such facts as these, that motion picture exhibitions are frequented by a large number of children, that the audiences include those classes whose age, education and situation in life entitle them to especial protection, and concludes that the law was well calculated to secure decency and morality in the moving picture business. Cases are abundant where the court has in like manner clearly and consciously considered the particular facts of the social situation which the law was intended to remedy; *Ebery* v. *Loden,* 83 Atl. 564, 40 L. R. A. (N. S.) 193; *Opinions of the Justices,* 155 Mass. 598, 28 N. E. 1126, especially the opinion of Mr. Justice BARKER; and the dissenting opinion in *State* v. *Loomis,* supra; another striking instance is the consideration given to the sociological and physiological data contained in the brief of Mr. BRANDEIS in the case of *Muller* v. *Oregon,* 208 U. S. 412, referred to on pages 419 and 420 of the report. Even in the cases where the courts make no definte reference to the economic facts or to their theory of them, there is yet behind each decision involving the conflict of the police power and the restraints on the legislature, a recognition, amounting in some cases to no more than a prejudice or an instinct, of one or another economic or social theory. The court must decide and does decide what the welfare of society possibly demands. But when it does that it undertakes to inquire into the same sort of considerations that the legislature before it has regarded. The legislature says what *is* necessary for the welfare of society; the court says whether it may *possibly* be for its welfare. Both must pass upon the same question, involving the same considerations, albeit in a different degree. If that conclusion is correct, there is no such separation of the functions of government as has traditionally been supposed.

This result leads to a unique situation, which is briefly as follows: The great regard of the American people for their written constitutions has led them to countenance the practice of the courts to disregard legislation as unconstitutional. But in determining whether or not it is constitutional the courts have been forced, in a great many cases, to assume, in practical effect, the part of the legislator. Two bodies pass upon the one question of the need of a certain piece of legislation; one of those bodies combines with this legislative power also a judicial power.

And yet while the judiciary exercises functions that require judgments such as those required of the legislature, the result, in that it causes a commingling of supposedly distinct powers, has not been fraught with the disaster that philosophers of the eighteenth century feared. That there could be no liberty if any two functions of government were combined in one body was the view of MONTESQUIEU. The courts can exercise no "arbitrary control" over the individual as matters now stand, for their power does not extend to the enactment of laws, but only to their defeat. There is, however, the danger always imminent, that highly beneficial social legislation be in effect nullified by the inadequate social philosophy of the justices.

The matter of the social philosophy is all-important. While it may be conceded that the conservatism of the courts has at times been fortunate, yet there can be little question that the extremely individualistic doctrines manifested in some of the decisions, even late ones, are entirely insufficient to cope with existing economic conditions. Perhaps the courts should be criticised for clinging to the doctrines of a by-gone day.

But therein the courts reflect the omission of our entire present-day society. True, social theories in great number are being expounded, but their defect is a devotion to a too narrow set of interests. Americans are a nation of particularists. Their vision comprehends little of the past, little of the future, and only fragments of the present. A broad philosophy, touched with a universal spirit, is lacking. Ideals are in confusion, revered institutions are disintegrating, it is a period of great crisis. The need is for the thinker to construct, from the experiences of the nation, a view and an ideal adequate to modern society. In accomplishing this task the judiciary, including as it does much of the strongest intellect, will no doubt do its part. But a clear realization of the work to be done is important as the first step.

W. W. S.

LOSS THROUGH GROSS NEGLIGENCE OF CARRIER AS CONVERSION. — When goods are carried by a common carrier under a limited liability contract, and the carrier has converted the goods, can it set up the contract value as the maximum amount that the shipper is entitled to recover in an action for conversion of the goods? Will the carrier be deemed to have converted the goods if they are lost through his gross negligence?

In *Nashville, C. & St. L. Ry.* v. *Truitt Co.*, 86 S. E. 421, twenty-eight mules were shipped by plaintiff under a contract limiting liability to $100 per head in consideration of the reduced freight rate. When the goods arrived at the destination, it was found that in some unexplained manner, three mules of inferior kind had been substituted for three of those originally shipped. The Georgia Court of Appeals *held,* that the substitution being unexplained by the carrier, a presumption that the goods were lost through the *gross negligence* of the carrier arises, which will be sufficient to support an action for conversion against the carrier; and that the amount of the shipper's recovery will not be limited to the contract valuation, but that he may recover the full amount of his loss.